No. 89-532

Supreme Court, U.S.
DEC 1 1989
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PEAT MARWICK MAIN & CO.,

Petitioner,

—v.—

W. DAVID HOLLOWAY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF IN FURTHER SUPPORT OF PETITION

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Reference is made to Peat Marwick's statement pursuant to Rule 28.1 at page ii of the Petition for a Writ of Certiorari ("Pet.").

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THE PETITION PRESENTS AN IMPORTANT ISSUE RELATING TO PASSBOOK SAVINGS ACCOUNTS AND THRIFT CERTIFICATES ISSUED BY UNINSURED FINANCIAL INSTITUTIONS

This reply brief responds to the principal new arguments advanced by respondents in the brief in opposition ("Br. Op.").

(1) Respondents argue that their case is unique (Br. Op. 14) and, as a corollary, that this case has nothing to do with banks or financial institutions (*id.* at 12-13). In both respects they are mistaken.

Perhaps the clearest example of this error is Respondents' criticism of the Petitioner's use of a General Accounting Office

report in compiling the statistics set forth at note 25 in the Petition. The Brief in Opposition states:

> "Indeed, the title of the report relied on by petitioners for the statistics cited reveals its inappropriateness. It is titled 'Results of General Accounting Office Survey to Identify Uninsured Financial Institutions That Accept Deposits From the Public' [hereafter, *GAO Report*]. As noted above, neither RTS nor RFC was authorized to accept *deposits* at all." Br. Op. at 14 n.17 (emphasis in original).

But it was precisely the problems at Republic Trust (referred to by Respondents as RTS) and Republic Finance (RFC) that occasioned the Congressional hearing and the Congressional request for the GAO inquiry concerning "financial institutions that accept deposit-like notes from the public." *Depositor Treatment in Bankruptcy Proceedings of Uninsured Financial Institutions: Hearings Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1988) at 1; *GAO Report* at 1-2. Republic Trust and Republic Finance were specifically discussed in that report (*id.* at 17-18). Far from illustrating the inappropriateness of the Petitioner's categorization of the institutions, the report confirms the central relevance of such analysis.[1]

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1 Nor were Congress and the GAO alone in recognizing that Oklahoma trust companies could accept deposits, make loans and otherwise function in ways similar to conventional banks. *See, e.g., Citicorp*, 69 Fed. Res. Bull. 921 (1983), where the Federal Reserve Board authorized the acquisition of an Oklahoma trust company by an out-of-state bank holding company. The Oklahoma Bankers Association protested the formation of this new entity because "under Oklahoma law a trust company has the power to make commercial loans and to accept demand deposits." *Id.* at 921. It urged that these characteristics made the entity a bank for purposes of the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq.*, and hence not available for acquisition by the out-of-state holding company. The Federal Reserve accepted the statement of Oklahoma law and its approval of the acquisition was premised on the holding company's agreement to accept only time deposits and to forego its rights to accept demand deposits. The Federal Reserve Board's decision was affirmed on this basis by the Tenth Circuit which noted that "[t]he powers granted to trust companies by Oklahoma

Moreover, the GAO Report's inclusion of scores of other institutions along with Republic Finance and Republic Trust in a report dealing with "uninsured financial institutions that accept deposits from the public" emphasizes that far from being "unique" as Respondents would have it, the institutions and instruments at issue here are commonplace. Indeed, the North American Securities Administrators Association ("NASAA"), as *amicus curiae* in *Reves* v. *Arthur Young & Co.* (No. 88-1480), has argued to this Court that the circumstances presented in *Holloway* with respect to "thrift and finance companies" are neither isolated nor confined to one state or geographical region. After noting the failure of a number of independent Oklahoma "trust companies similar to Republic Trust," they observed that "the Oklahoma experience" is not "an isolated one," listing "many" other states which have had problems with "thrift and finance companies." Brief for NASAA as *Amicus Curiae*, *Reves* v. *Arthur Young & Co.* (No. 88-1480) at 8. While NASAA (an association of state securities commissioners) argues that what it views as the recurrent problems with such institutions warrant treatment of the instruments in *Holloway* and *Reves* as securities, the point its brief underscores is that the issues posed in *Holloway* are common, not unique.[2]

Respondents assert that this case is fact-sensitive (Br. Op. 11). That is true in most cases, once the governing rules are clear. The important question presented here is whether the court of appeals acted in conformity with the definitions set

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law are substantially similar to the powers granted banks." *Oklahoma Bankers Ass'n* v. *Federal Reserve Board*, 766 F.2d 1446, 1449-50 (10th Cir. 1985). It referred to the entity as a "non-bank bank". *Id.* at 1449. Like the institutions at issue here the proposed new entity planned to engage in lending activities and to issue "thrift certificates" and "thrift passbook certificates" which the Federal Reserve Board characterized as "time deposits." *Id.*

2 This case presents questions concerning the instruments of banking or financial service institutions which the Assistant to the Solicitor General and counsel for the petitioners in *Reves* were at pains to note (in oral argument in *Reves*) were not at issue in that case. It thus presents important and recurring issues that will not be resolved in *Reves* regardless of this Court's disposition of that case.

forth in the Securities Acts in laying down a rule which subjects deposit and deposit-like instruments issued by a broad array of financial institutions to the federal securities laws, in addition to the other applicable federal and state laws regulating such institutions and instruments.

(2) Respondents' brief itself is also noteworthy both for its recognition that the Tenth Circuit is "the first to hold that no amount of state regulation will satisfy *Marine Bank*" and for Respondents' all but explicit unwillingness to support that position in its fullest reach (Br. Op. 21 n.23 and *see id.* at 23-24). While Respondents' reluctance to support the Tenth Circuit's wholesale rejection of the relevant state regulation is understandable, no less extreme position can sustain the holding below given the substantial state regulation in place here. (A description of that state regulation is set forth at pp. 6-8 of the Petition.) The brief is also striking in its total failure to deal with the omission of certificates of deposit or passbook accounts as such from the definitional language of the Securities Acts despite Congress' contemporaneous familiarity with those terms and the use of those terms in other legislation enacted by the same Congress.

The Tenth Circuit's holding squarely conflicts with the holdings of other circuits as the opinion below *explicitly* recognizes (Pet. 18a n.9, 24a n.11). That holding affects a broad range of financial institutions and reflects an approach which is insensitive (i) to the language of the Securities Acts, (ii) to principles of federalism, (iii) to the sometimes competing goals of the securities laws and those relating to financial institutions,[3] and (iv) to

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3 Respondents' allegation that Republic Holding "secretly divested itself" of Republic Trust and Republic Finance (Br. Op. 10), a divestiture occasioned by a Federal Reserve "termination notice" (Br. Op. 9), only emphasizes the disparity in approach between banking regulation (in which confidentiality is often viewed as desirable) and securities regulation (which is premised on a competing philosophy emphasizing disclosure.) (Indeed, the June 13, 1984 termination notice quoted by respondents was deemed confidential by the Federal Reserve Board even after this litigation began and was subject to a protective order obtained by the Board.)

While the securities laws focus on regulation through disclosure, the various state and federal banking laws emphasize direct regulation of banking

this Court's prior decisions with respect to the definition of securities. The decision of the Court of Appeals warrants review.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, the petition for a writ of *certiorari* should be granted.

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Respectfully submitted,

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practices and managers. The Tenth Circuit's opinion took note of the divergent approaches, but failed to consider them in assessing the status of the instruments at issue (Pet. 25a). The question is not whether federal securities regulation is a good thing, as Respondents and the Tenth Circuit would have it, but whether Congress intended to apply the federal securities laws and all that such application entails to financial institutions and instruments like those at issue in light of the competing policy considerations at work.